

NO. 43549-7-II

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

LYNITA GARCIA,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THURSTON COUNTY

The Honorable Thomas McPhee, Judge

OPENING BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The State failed to prove all elements of the crime of burglary in the second degree beyond a reasonable doubt as a principal or accomplice.

2. The State failed to prove all elements of the crime of trafficking in stolen property in the first degree beyond a reasonable doubt as a principal or accomplice.

3. The State failed to prove all elements of the crime of theft in the third degree beyond a reasonable doubt as a principal or accomplice.

4. The trial court erred when it gave the jury Instruction 9, Accomplice Liability, which was unsupported by the evidence.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Was there insufficient evidence to find appellant guilty of burglary in the second degree, trafficking in stolen property in the first degree, and theft in the third degree because the State failed to prove beyond a reasonable doubt that Lynita Garcia aided or agreed to aid another person in planning or committing burglary, trafficking in stolen property, and theft? Assignments of Error No 1, 2, 3, and 4.

2. Is mere presence at the scene of an alleged burglary, trafficking in stolen property, and theft, sufficient evidence to establish a

violation of RCW 9A.52.030 as an accomplice? Assignments of Error No. 1, 2, 3, and 4.

## **C. STATEMENT OF THE CASE**

### **1. Procedural Facts:**

Lynita Garcia, along with Kim Cole, John Dunham, and Michael Horner, were charged by amended information filed in Thurston County Superior Court with burglary in the second degree, (RCW 9A.52.030(1)); trafficking in stolen property in the first degree, (RCW 9A.82.050(1)), and theft in the third degree (RCW 9A.56.050). Clerk's Papers [CP] 6-7.

The matter came on for jury trial on May 15, 2012, the Honorable Thomas McPhee presiding.

The defense did not note exceptions to requested jury instructions not given or object to instructions given. 4Report of Proceedings [RP] at 633.<sup>1</sup> The jury was instructed on accomplice liability. CP 85, Instruction 9.

On May 22, 2012, the jury found Ms. Garcia guilty of the charged offenses. CP 107, 108, 109; 5RP at 830.

The matter came on for sentencing on June 6, 2012. The court

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<sup>1</sup> The record of proceedings is designated as follows: January 30, 2012, hearing; February 29, 2012, hearing; March 9, 2012, hearing; March 7, March 12, 2012, hearing; May 9, 2012, status hearing; 1RP – May 15, May 16, 2012, jury trial; 2RP—May 16, May 17, 2012, jury trial; 3RP—May 17, May 21, 2012, jury trial; 4RP—May 21, 2012, jury trial; 5RP—May 21, May 22, 2012, jury trial; and June 6, 2012, sentencing.

granted first time offender waiver. 6/6/12 RP at 28; CP 118.

Timely notice of appeal was filed on July 3, 2012. CP 126. This appeal follows.

**2. Testimony at Trial:**

Roland Olbrich met William White through Alcoholics Anonymous meetings they attended. 2RP at 298, 367. Mr. Olbrich died on August 15, 2011, and Mr. White learned through attendees at AA meetings that people were taking items from Mr. Olbrich's property in Thurston County near Rainier, Washington. 2RP at 283, 298, 299. He stated that after learning of the thefts, he went to the persons he had heard were responsible for taking items from the property and told them that they had three days to return the missing items or he would contact the police. 2RP at 299. He ended up making reports to the police because only three people returned items. 2RP at 299, 300, 313.

The property consisted of Mr. Olbrich's house, a garage, a detached carport, and a metal Sea Land cargo container. 1RP at 95, 96, 2RP at 290, 306. The property contained a large amount of metal and broken equipment. 1RP at 95. Law enforcement responded to a number of theft complaints at the property. 2RP at 284. Mr. Olbrich's family requested that Mr. White

serve as property manager to get the property ready to sell. 2RP at 303. Mr. White changed the locks to the house on October 7, 2011, but items from the property continued to disappear. 2RP at 311, 320. Because of the large volume of items on the property, it was difficult to tell what was missing, so Mr. White stated that he “staged” items to see if anything disappeared. 2RP at 316.

On October 12, he reported to police that Mr. Olbrich’s pickup truck was stolen from the property. 2RP at 283. There was no information that any of the four co-defendants were involved in the theft of the truck, which was later recovered in Pierce County. 2RP at 293.

On the afternoon of October 15, 2011, Mr. White stopped at the property and saw a Ford Ranger pickup truck parked on the property. 2RP at 324. He called 911, then drove closer to the truck and saw a man come out from the carport. 2RP at 325. The man got into the Ranger and started to back up. 2RP at 325. Another man came out of the Sea Land container and got into the passenger side of the truck. 2RP at 325. The men were identified as Mike Horner and John Dunham. 2RP at 329, 330.

Mr. White stated that he maneuvered his truck to block the road in order to keep the Ranger from leaving, and the driver tried several times to get around him, then backed up and stopped the truck. 2RP at 331. Mr.



White stated that after the Ranger stopped, he then saw two women come out of the Sea Land container and walk to the Ranger. 2RP at 332, 335. Mr. White identified the women as Kim Cole and Lynita Garcia. 2RP at 336.

Thurston County Deputy Sheriff Jason Casebolt arrived at the property in response to the 911 call. 1RP at 79. He was unable to enter the property through the front gate, which was locked. 1RP at 82. He was directed by Mr. White, who was still on the phone to 911, to enter the property from a back entrance. 1RP at 82, 91. Deputy Casebolt saw four people when he arrived at the property, including Ms Garcia. 1RP at 93. Deputy Casebolt observed several metal objects in the back of the pickup truck, including a come along, a steel pry bar, and bumper jacks. 1RP at 100, 101. Copies of recycling receipts from two recycling businesses in Pacific, Washington were found by police in the Ranger. 1RP at 120, 122.

Kimberly Knecht, manger of Valley Recycling, knew Ms. Garcia from the recycling business. 1RP at 134, 135. She described her as a “\$30 customer,” which is a metal scrapper or peddler who brings in a maximum of \$30 worth of metal at a time. 1RP at 128. Bringing in an amount of scrap worth less than \$30 does not require a state-mandated 10 day waiting period or a business license, which is required for persons scrapping larger amounts of metal. 1RP at 128, 129. Valley Recycling had issued receipts to Ms.

Garcia, Mike Horner, and John Dunham. 1RP at 129.

John Dunham testified that he believed that Ms. Cole and Mike Horner were going to bid on a job to clean up the property. 3RP at 541. He stated that before arriving at the property, they went to a meat market and bought meat. 3RP at 541. He stated that none of them had been to the property before. 3RP at 542. He stated that Mr. Horner was driving the truck and that he did not know how he found the property. 3RP at 548.

Ms. Garcia stated that Kim Cole had heard about a property where the owner had died and she wanted to find a neighbor to see if they could get a job cleaning up the property. 3RP at 559. Ms. Cole asked Mr. Horner several times about going with her to the property and he agreed to drive. 3RP at 564. Ms. Garcia stated that Mike Horner asked if she wanted to go along with them, and she agreed to do so because she wanted to get meat at Stewarts Meats. 3RP at 558. After arriving at the property, Ms. Garcia had to go to the bathroom so she got out of the truck in order to go to the bathroom in the woods near the Sea Land container. 3RP at 559, 571. She denied entering the Sea Land cargo container and stated that she did not pick up any items on the property. 3RP at 560. She stated that she did not know where Mr. Horner was going, and that she went for a ride to shop at Stewarts Meats, which she had heard was a good shop. 3RP at 565. They stopped at

the meat market and bought hamburger and steaks and other items. 3RP at 574.

Mr. Horner denied taking any items and stated that the items in the back of the truck and a trailer hitch on the truck belonged to him. 3 RP at 587.

**D. ARGUMENT**

**1. THERE WAS INSUFFICIENT EVIDENCE TO PROVE THE ELEMENTS OF THE CRIMES BEYOND A REASONABLE DOUBT.**

**a. The State must prove each element of a crime beyond a reasonable doubt.**

There was insufficient evidence to find Lynita Garcia guilty of burglary, trafficking in stolen property, and theft as a principal or accomplice because the State failed to prove beyond a reasonable doubt that she aided or agreed to aid co-defendant Cole, Dunham, and Horner, in planning or committing any of the alleged offenses. Ms. Garcia's convictions must therefore be reversed and dismissed.

The due process clauses of the federal and state constitutions require that the State prove every element of a crime beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368

(1970); U.S. Const. amends. 6, 14; Wash. Const. art 1, § 3, 21, 22. Where the sufficiency of the evidence is challenged on appeal, the critical inquiry is whether, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The existence of a fact cannot rest upon “guess, speculation, or conjecture.” *State v. Hutton*, 7 Wn.App. 726, 728, 502 P.2d 1037 (1972).

To prove the offense of burglary in the second degree as charged here, the State had to establish that Garcia committed the following elements of the charged offense:

(1) A person is guilty of burglary in the second degree, if with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle or a dwelling.

RCW 9A.52.030.

To prove Garcia committed the offense of trafficking in stolen property in the first degree, the State had to establish:

(1) A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen

property, is guilty of trafficking in stolen property in the first degree.

RCW 9A.82.050.

To convict Garcia of theft in the third degree, the State had to establish:

(1) A person is guilty of theft in the third degree if he or she commits theft of property or services which (a) does not exceed seven hundred fifty dollars in value . . . .

RCW 9A.56.050

Here there is insufficient evidence to suggest that a burglary occurred, theft, or trafficking in stolen property occurred. White testified that he saw Garcia coming from the Sea Land container. 2RP at 335. The only indication of an intent to commit a crime against a person or property therein appears to be from the testimony of White that objects were moved and some metal objects were in the back of the pickup truck. White testified that he did not see Garcia carrying any object and there was no showing that any of the objects that were moved or which were in the back of the truck came from the storage container. At no point, was Garcia seen in possession of any item from the property.

To be guilty of burglary, a person must “enter” a dwelling with an intent to commit a crime against a person or property therein. To be guilty of

trafficking in stolen property, there has to be a showing that Garcia knowingly planned, directed, supervised, organized the theft of property for sale to others.

Here, there is no indication that Garcia committed theft, or that she entered the Sea Land container with intent with any intent to commit an offense within the container, or that she planned or otherwise directed or supervised the theft of items from the property.

**b. The evidence failed to establish accomplice liability beyond a reasonable doubt.**

The jury was instructed on accomplice liability. CP 85. Instruction 9. An accomplice is criminally liable only when the accused knowingly aids in the commission of the specific crime charged. *State v. Roberts*, 142 Wn.2d 471, 500, 14 P.3d 713 (2002); *State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000); RCW 9A.08.020(3).

RCW 9A.08.020 provides that a person is guilty of a crime when he or she is an accomplice of another person in the commission of the crime. A person is an accomplice if:

- (a) With knowledge that it will promote or facilitate the commission of the crime, he
  - (i) solicits, commands, encourages, or requests such other person to commit it; or
  - (ii) aids or agrees to aid such other person in planning or committing it.

RCW 9A.08.020(3).

Washington case law has consistently supported the axiom that mere physical presence, even if coupled with assent, is insufficient to support a conviction for aiding and abetting. *In Re Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979). To support conviction of a defendant as an accomplice, there must be evidence that she was "ready to assist" or intended to encourage the conduct of her co-participant; mere presence at the scene of the crime is insufficient. *In Re Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979), quoting from *State v. Aiken*, 72 Wn.2d 306, 349, 434 P.2d 10 (1967).

An accomplice must be associated "with the venture and participate in it as something he wishes to bring about and by his action make it succeed." *State v. Jennings*, 35 Wn. App. 216, 220, 666 P.2d 381, review denied, 100 Wn.2d 1024 (1983).

Even when an individual has knowledge of the criminal activity and is personally acquainted with the participants in the crime, his or her mere presence at the scene of the crime is insufficient to establish accomplice liability. *In re Wilson*, 91 Wn.2d at 490-92. An accomplice must share in the criminal intent of the principal, and there must be a "community of unlawful purpose." *State v. Boast*, 87 Wn.2d 447, 456, 553 P.2d 1322 (1976). The

accomplice must participate “in the criminal act in furtherance of the common design, either before or at the time the criminal act is committed,” and “seek by his action to make it succeed.” *State v. Gladstone*, 78 Wn.2d 306, 312-13, 474 P.2d 274 (1970).

Mere presence and even assent that the offense occur are insufficient to prove accomplice liability. *State v. Everybodytalksabout*, 145 Wn.2d 456, 472, 39 P.3d 294 (2002). “Something more than presence alone plus knowledge of ongoing activity must be shown to establish the intent requisite to finding [an accused] to be an accomplice.” *Id.*, quoting *In re Welfare of Wilson*, 91 Wn.2d at 491-92. Even if one’s presence encourages the principal in committing the crime, such passive encouragement does not render the bystander an accomplice. *Wilson*, 91 Wn.2d at 492.

There was absolutely no evidence that Garcia was involved in any way in burglary, theft, and trafficking in stolen property. There was no evidence that she encouraged or aided in the commission of a crime, or that she in any way participated in the venture. Moreover, there is no evidence that Garcia had prior knowledge that Cole and Horner were going to commit a crime. The evidence showed that Garcia went with Cole and Horner without knowledge of any intention to commit a crime; Garcia stated that she



did not know the location of the Olbrich property and went with them so that she could shop at Stewarts Market.

Reversal and dismissal is required because more than presence and knowledge of a crime must be shown “to establish the intent requisite” to a finding of accomplice liability. *In re Wilson*, 91 Wn.2d at 492. The failure of the State to prove all elements of each of the charges requires that the convictions be reversed and dismissed with prejudice. The evidence was insufficient to prove all elements of the crimes. Reversal of the convictions is required, and double jeopardy prohibits retrial. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

**E. CONCLUSION**

For the reasons stated, this Court should reverse and dismiss Lynita Garcia’s convictions.

DATED: December 3, 2012.

Respectfully submitted,  
THE TILLER LAW FIRM

*Peter B. Tiller*

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Of Attorneys for Lynita Garcia

### CERTIFICATE OF SERVICE

The undersigned certifies that on December 3, 2012, this Opening Brief of Appellant was e-filed to (1) the Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and (2) Ms. Heather Stone, Deputy Prosecutor at [stoneh@co.thurston.wa.us](mailto:stoneh@co.thurston.wa.us) and a copy was mailed to Ms. Lynita Garcia, 25509 162<sup>nd</sup> St. E., Buckley, WA 98321.

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on December 3, 2012.

*Peter B. Tiller*

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PETER B. TILLER

# TILLER LAW OFFICE

**December 03, 2012 - 4:47 PM**

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